IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, *ET AL.*,
Petitioners,

v.

JAMES NEWKIRK,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMICI CURIAE THE NATIONAL PRISON PROJECT AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. The Traditional and Rudimentary Elements of Procedural Due Process Defined in *Wolff v. McDonnell* Are Applicable to Prison Transfer Proceedings Threatening Grievous Losses 3

II. The Rule of Administrative Law and the Constitution Both Require the Provision of a Procedurally Fair Hearing Prior to an Involuntary Transfer 12

III. The State of New York Cannot Show a Sufficient Interest to Justify Transferring Prisoners Absent Prior, Due Process Hearings 13

CONCLUSION 16

TABLE OF CITATIONS

Cases:

Atchison, T & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) 3, 12

Board of Regents v. Roth, 408 U.S. 564 (1972) 9

Boddie v. Connecticut, 401 U.S. 371 (1971) 4

Page

Cafeteria & Restaurant Workers Union v. McElroy,
367 U.S. 886 (1961) 4

Childs v. U.S. Board of Parole,
____ F.2d ____, No. 74-1052 (D.C. Cir. 12/19/74) . . . 12

Clonce v. Richardson,
379 F. Supp. 338 (W.D. Mo. 1974) 2, 7, 13, 14

Crandall v. Nevada,
73 U.S. 35 (1867) 11

Croom v. Manson,
367 F. Supp. 586 (D. Conn. 1973) 14

Daigle v. Hall,
____ F. Supp. ____, C.A. No. 74-4783
(D. Mass. 12/20/74) 5, 8

Dent v. West Virginia,
129 U.S. 114 (1889) 4

Edwards v. California,
314 U.S. 160 (1941) 11

Environmental Defense Fund v. Ruckleshaus,
439 F.2d 584 (D.C. Cir. 1971) 13

Gomes v. Travisono,
353 F. Supp. 457 (D.R.I. 1973) 10

Gomes v. Travisono,
490 F.2d 1209 (1st Cir. 1973) 8, 9, 11

Gomes v. Travisono,
____ F.2d ____, No. 73-1065 (1st Cir., 12/20/74),
on remand, ____ U.S. ____, 42 U.S.L.W. 2709 (7/8/74) . . 3, 7

Page

Greater Boston TV Corp. v. FCC,
444 F.2d 841 (D.C. Cir. 1970), cert. den.,
404 U.S. 923 (1971) 12, 13

Haines v. Kerner,
404 U.S. 519 (1972) 3

Hoitt v. Vitek,
361 F. Supp. 1238 (D.N.H. 1973) 10

Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) 8

Kessler v. Cupp,
372 F. Supp. 76 (D. Ore. 1973) 8

Morris v. Travisono,
310 F. Supp. 857 (D.R.I. 1970) 8

Morrissey v. Brewer,
408 U.S. 471 (1972) 4, 7, 9

Procunier v. Martinez,
416 U.S. 396, 94 S.Ct. 1800 (1974) 2, 10

Robbins v. Kleindienst,
383 F. Supp. 239 (D.D.C. 1974) 2, 7, 13, 14

S.E.C. v. Chenery Corp.,
332 U.S. 194 (1947) 12

Stone v. Egeler,
____ F.2d ____, No. 74-1256 (6th Cir. 11/15/74) 7

Page

Walker v. Hughes,
___ F. Supp. ___, C.A. No. 39765 (E.D. Mich. 12/12/74),
on remand ___ F.2d ___ (6th Cir. 9/26/74) 7

Wolff v. McDonnell,
418 U.S. 539, 94 S.Ct. 2963 (1974) . . . . . passim

Statutes:

Habeas Corpus Act of 1679, 31 Car. II, c. 2 11

Regulations:

Federal Bureau of Prisons Policy Statement,
Inmate Discipline, #7400.5c (10/4/74) 14

Other Authorities:

Comment, 33 U. Pitt. L. Rev. 638 (1972) 6

Fogel, *The Justice Model For Social Work in Corrections*, Social Work Practice and
Social Justice, 26 (N.A.S.W. 1972) 5

Habeas Corpus in the Colonies,
8 Am.Hist. Rev. 18 (1903) 11

National Advisory Commission on Criminal Justice
Standards and Goals, *Report on Corrections* (1973) 14

R. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* (1858) 11

Wasserman, *Deportation and Exile*,
Encyclopedia Brittanica, Vol. 7, 266 (1963) 11

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INTEREST OF AMICI CURIAE

The National Prison Project of the American Civil Liberties Foundation, Inc., is a non-profit, tax-exempt New York corporation, engaged in efforts, through staff attorneys and other employees, to develop rehabilitative and other programs and facilities, devise model prison procedures and regulations, and otherwise to improve prison conditions in the United States.

In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions throughout the country. The Project has been involved in many important cases with issues similar to those in the case at bar. Eg. *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974).

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation formed under the laws of the State of New York in 1939.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon black people and upon the poor, deprived and friendless, who too often are black. To further this purpose, the Fund in 1967 established a separate corporation, the National Office for the Rights of the Indigent (N.O.R.I.), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine which unjustly affect the poor.

In 1970 the Fund received a foundation grant for the purpose of promoting efforts toward prison reform. The grant contemplates that the Fund will do research to identify the most serious and fundamental problems in corrections and will bring test litigation or suggest administrative or legislative reform where appropriate.

The Fund has been involved in many important prison cases in different states. The issues presented in those cases cover a broad spectrum of the difficulties faced by prisoners in realizing their fundamental rights as American

citizens. E.g., *Procunier* v. *Martinez*, 416 U.S. 396, 94 S.Ct. 1800 (1974); *Haines* v. *Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972); *Gomes* v. *Travisono*, ___F.2d ___, Civil Action No. 73-1065 (1st Cir. 12/20/74), on remand, ___ U.S.___, 42 U.S.L.W. 2709 (7/8/74).

SUMMARY OF ARGUMENT

The only issue before the Court with which this brief is concerned is what process, if any, is due prisoners who suffer grievous losses as a result of their transfer from one prison to another. *Amici* contend that such prisoners are entitled to "those minimum procedures appropriate under the circumstances and required by the Due Process Clause," *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 2975 (1974). In addition, these procedures are essential to "the integrity of the Administrative process," *Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807 (1973). *Amici* contend that both constitutional law and administrative law support the opinion of the lower court which, therefore, ought to be affirmed.

ARGUMENT

I. THE TRADITIONAL AND RUDIMENTARY ELEMENTS OF PROCEDURAL DUE PROCESS DEFINED IN *WOLFF* v. *McDONNELL* ARE APPLICABLE TO PRISON TRANSFER PROCEEDINGS THREATENING GRIEVOUS LOSSES.

This Court has repeatedly held that a due process hearing is necessary before the government may act in a way injurious to private interests whenever "the nature of the interest [jeopardized by governmental action] is one

within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971). Involuntary transfers directly and indirectly compromise the most fundamental prisoner interest there is – the interest in personal liberty and freedom from incarceration. Such transfers also abridge other interests that are of critical importance including the ability of prisoners to enjoy the basic entitlements of prison life and to participate in programs of rehabilitation. These important interests are of "real substance" and are "sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [the prisoner] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause . . . ." *Wolff* v. *McDonnell*, *supra*, 94 S.Ct. at 2975; *Morrissey* v. *Brewer*, *supra* at 481.

If the interests are found to be constitutionally protected, as *Amici* contend that they are, the question becomes not whether due process applies, but what process is due. The analysis of the scope and content of the process due before that interest may be compromised "must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 887, 895 (1961). The State of New York argues that transfer is a classification device (Petitioner's Brief at 16) that is immune from the requirements of due process. It is a maxim of Constitutional law, however, that the touchstone of due process is protection of the individual from arbitrary government action, *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889), and it is the effect,

rather than the nomenclature assigned to such action that is determinative.[1]

No legitimate state interest dictates that any of the minimum requirements of due process be abrogated. Indeed, it is in the interest of the state to assure that prisoners facing the losses which inevitably result from such transfers have first been afforded due process. The potential for a prisoner's rehabilitation will be maximized if he is treated fairly. Conversely, tension born of resentment will be encouraged by state officials when they refuse to treat prisoners fairly.[2]

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[1] In a post-*Wolff* decision concerning long-term segregation, the U.S. District Court for the District of Massachusetts stated: "The proceedings in this case wer edenominated classification hearings . . . . It is necessary to look behind lables as to the operative effect of the proceedings. It would appear from the exhibits that in prison administration, 'positive' euphemisms are endemic." *Daigle* v. *Hall*, __ F. Supp. __, Civil Action No. 74-4783-5 (D.Mass. 12/20/74). A copy of this as yet unreported decision is on file in the Clerk's office.

[2] David Fogel, Director of the Illinois Law Enforcement Commission and former Commissioner of the Minnesota Department of Corrections, explained the vital necessity of treating prisoners with fairness and justice:

> The justice model seeks to engage both the keeper and the kept in a joint venture, which would force the agencies of justice to operate in a lawful and just manner. It simply means a belief that the prisoner did not use lawful means outside the prison and should therefore be provided more (not fewer) opportunities to learn lawful behavior in the institution. The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to accept responsibility for the consequences of his behavior. In the absence of a continuum of justice in the

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The flexible nature of procedural due process allows legitimate state interests to be protected without sacrificing the procedural protections which are essential to accurate fact-finding. These protections include the right to written notice of charges and disclosure of the basis for the proposed transfer, the opportunity to be heard in person and to present witnesses, the right to confront and cross-examine adverse witnesses, the right to representation by counsel or counsel-substitute and the right to a written decision by an impartial hearing tribunal.

The Court's landmark decision of *Wolff* v. *McDonnell* has served as the guidepost for at least two United States Courts of Appeals and three United States District Courts

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[2] (continued)

prison, most ends are reached unlawfully. When unlawful behavior in the prison is detected, the standards of due process that we insist upon outside the prison are not applied. The result is a further indication to the convict that lawful behavior for a convict has little payoff. He can be dealt with arbitrarily and usually responds by treating others in the same manner. The justice model would make sure that the prisoner experienced lawful ways of dealing with problems with the expectation that there would be a carryover to the point of release. The prison experience would try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.

Fogel, *The Justice Model for Social Work in Corrections*, Social Work Practice and Social Justice, 26, 32 (N.A.S.W. 1972).

Commentators as well as penologists have recognized this principle. "It is submitted that one of the most disruptive influences upon the rehabilitative scheme is the belief that the law is arbitrary." Comment, 33 U.Pitt. L.Rev. 638, 642-43 (1972).

which have since issued opinions concerning prisoner transfers. *Gomes* v. *Travisono*, ___F.2d ___, Civil Action No. 73-1065 (1st Cir. 12/20/74), on remand, ___ U.S. ___, 42 U.S.L.W. 2709 (7/8/74); *Stone* v. *Egeler*, ___F.2d ___ Civil Action No. 74-1256 (6th Cir. 11/15/74); *Walker* v. *Hughes*, ___F. Supp. ___, Civil Action No. 39765 (E.D. Mich. 12/12/74), on remand, ___F.2d ___ (6th Cir. 9/26/74)[3]; *Robbins* v. *Kleindienst*, 383 FSupp. 239 (D.C. D.C. 1974); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974). Each court has found that the principles of due process as applied in *Wolff* should apply with equal force to prisoners who will suffer grievous losses as a result of their transfer from one prison to another.

Each of the post-*Wolff* transfer cases concerned to some extent the plight of a prisoner who, like Respondent Newkirk, had not been transferred for "disciplinary" reasons, but who suffered grievous losses nonetheless because of the inherently punitive aspects of the transfer process. As required by *Wolff*, *supra* and *Morrissey*, *supra*, each court based its decision on a careful analysis of the nature of the losses suffered by the prisioner, rather than on the stated purpose of or the label affixed to the proposed transfer. The First Circuit found that

> [s]ince the disadvantages to the inmate flowing from an interstate transfer are substantial, whether it be characterized as punitive, administrative, or rehabilitative, the same safeguards should be available in all such cases. *Gomes* v. *Travisono*, *supra*, slip opinion at 7.[4]

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[3] Copies of the as yet unreported decisions in *Stone* v. *Egeler*, *Gomes* v. *Travisono*, and *Walker* v. *Hughes* are on file in the Clerk's office.

[4] Prisoners in *Gomes* were transferred from the Rhode Island prison system to various state and federal prisons outside Rhode Island.

The *Walker*, *Clonce*, and *Robbins* decisions were less concerned with the fact that the transfers were interstate, than with identifying the losses resulting from the transfers, according to the rationale of *Wolff*, *Morrissey*, and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Each decision, like that in *Gomes*, reached the same conclusion as *Wolff*, and as *Newkirk*: "minimum procedural safeguards [are necessary] as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Wolff* v. *McDonnell*, *supra*, 94 S.Ct. 2982, n. 19.

Each court reached that conclusion after finding that involuntary transfers, whether categorized as "disciplinary" or as "classification,"[5] resulted in loss of personal property, legal papers, and medical records; delay in parole hearings or denial of parole; placement in "administrative" segregation upon arrival at the receiving prison which was no less restrictive than "disciplinary" segregation[6]; loss and

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[5] "It is not always easy to distinguish discipline from treatment, since the goal of each is to induce the inmate to refrain from further infractions of the rules." *Daigle* v. *Hall*, *supra* at 10. Also see *Kessler* v. *Cupp*, 372 F.Supp. 76 (D.Ore. 1973).

[6] The receiving prison officials, who often do not receive adequate records from the sending prison, not surprisingly insist on a period of quarantine or administrative segregation, sometimes for months on end, which, to the inmate, is no different from any other kind of punitive confinement. In *Gomes* v. *Travisono*, *supra* 490 F.2d at 1213, the transferred prisoner would have been entitled to notice and hearing before any comparable intraprison change in living situation, whether or not it resulted from disciplinary action. See, e.g. *Morris* v. *Travisono*, 310 F.Supp. 857 (D.R.I. 1970). Nevertheless, one inmate who was transferred out of Rhode Island was kept in segregation for his entire stay at the receiving institution.

(continued)

diminution of correspondence and visiting opportunities; change, and often loss, of program opportunities; the delay and often the denial of statutory entitlements, such as good time credits, furloughs and work-release programs. All of these losses have been described in the transfer cases cited by the lower court opinions in *Preiser* v. *Newkirk*, as well as in the post-*Wolff* transfer cases.

Judicial recognition of these privations as protected interests reflects an application of the "accepted due process analysis as to property and liberty" in the prison context and, thus, the developing nature of the law. *Wolff* v. *McDonnell, supra,* 94 S.Ct. at 2975. In one such analysis, *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), this Court recognized that Roth had an interest in preserving his good name, reputation, honor and integrity, as well as his unimpaired ability to seek other employment opportunities. The Court, citing to *Morrissey* v. *Brewer, supra,* held that those interests came within the protection of the Fourteenth Amendment. Certainly the nature of involuntary transfers, whether they are called disciplinary or not, invariably affects these as well as a significant number of other fundamental interests. Transfers imply, for example, that the transferred prisoner has acquired a bad reputation, that he is an agitator or a troublemaker of some sort and that he is not to be trusted.[7] Second, transfers imply that whatever the prisoner's involvement in vocational or educational programs at the sending prison had

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[6] (continued)
Subsequently he was returned to Rhode Island, held in segregation for 10-12 days, and then transferred to a third state where he was also segregated. All of this occurred without notice or hearing. Respondent Newkirk was also held in administrative segregation as a result of his transfer.

[7] See, *Gomes* v. *Travisono, supra,* 490 F.2d at 1213.

been, the involvement was not sufficiently important to outweigh the prison's need to rid itself of him. Thus, the prison administrator's ability to impair the prisoner's educational, vocational and employment opportunities by means of transfer is potentially unlimited.[8]

Petitioner admits as much in his brief but reaches the conclusion that while "intangible considerations. . . cannot be the basis of disciplinary punishment, they should be the basis of allowing a warden to decide whether an inmate should remain at an institution." Petitioner's Brief, at 25. Such an argument springs from a philosophy that places correctional expertise above the law, and that sees no need for procedures to guide the administrator in the exercise of his power. This Court has rejected that position repeatedly. See, e.g., *Procunier* v. *Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 1813-14 (1974). Furthermore, it is difficult to understand how the Court could extend Constitutional protection to Roth's honor and integrity and not to the more tangible interests affected by transfers.

Amici contend that the prisoner's interests affected by an involuntary transfer are protected by the Constitution whether the transfer be inter-state or intra-state. Since the Court has before it the record of an intra-state transfer only, the Court should be aware that inter-state transfers encompass all of the grievous losses accompanying intra-state transfers as well as losses unique to interstate transfers. For example, in *Gomes* v. *Travisono, supra,* Rhode Island prision officials testified that when they transferred prisoners into either another state or into the federal prison system, the receiving prison system had exclusive authority to determine the place of incarceration.

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[8] See, *Hoitt* v. *Vitek*, 361 F.Supp. 1238 (D.N.H. 1973).

The Rhode Island officials therefore testified that they did not attempt to learn anything about receiving prisons and in fact would usually know nothing about them. Thus, "[o]ne black inmate was transferred to a prison with an entirely white population and had to be locked up in protective custody to stop his harassment by white inmates." *Gomes* v. *Travisono*, 353 F.Supp. 457, 463 (D.R.I. 1973).

Transfer into a foreign prison system usually guarantees that the prisoner's access to his parole board and to his state's unique system of prisoner entitlements will be diminished. *Gomes* v. *Travisono, supra*, 490 F.2d at 1213. Finally, inter-state transfer affects the prisioner's rights to petition elected officials for redress of grievances since officeholders possess neither the authority nor the inclination to inspect prisons outside their states. The right to petition for redress of grievances is traditionally associated with closeness to the seat of government. *Edwards* v. *California*, 314 U.S. 160 (1941); *Crandall* v. *Nevada*, 73 U.S. 35, 44 (1867). In fact, the Habeas Corpus Act of 1679, 31 Car. II, C.2, which prohibited the involuntary removal of prisoners to another county, much less another country, was passed in reaction to the British practice of "transporting" prisoners as a substitute for execution.[9]

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[9] Wasserman, *Deportation and Exile*, Encyclopedia Britannica, Vol. 7, 266 (1963); Habeas Corpus in the Colonies, 8 Am.Hist.Rev. 18 (1903). The 1679 Act was specifically embraced by virtually all of the new states. See generally R. Hurd, A Treatise On the Right of Personal Liberty and on the Writ of Habeas Corpus. 111-113, 137 (1858).

II. THE RULE OF ADMINISTRATIVE LAW AND THE CONSTITUTION BOTH REQUIRE THE PROVISION OF A PROCEDURALLY FAIR HEARING PRIOR TO AN INVOLUNTARY TRANSFER.

In addition to the constitutional right to due process, the prisoner is also protected from arbitrary exercises of governmental power by what Judge Leventhal of the United States Court of Appeals for the District of Columbia Circuit has called the "Rule of Administrative Law."

> The Rule of Administrative Law embraces the 'simple but fundamental' requirement that an agency or official set forth its reasons, *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196-7 (1947), a requirement that is essential to 'the integrity of the Administrative process.' *Atchison, T & S.F.R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807 (1973), for it tends to require 'the agency to focus on the values served by its decision . . . hence releasing the clutch of unconscious preference and irrelevant prejudice.' *Greater Boston TV Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970) *cert. denied*, 403 U.S. 923 (1971). *Childs* v. *Board of Parole*, Civil Action No. ___, ___ U.S. App. D.C. ___, ___ F.2d ___ (12/19/74) (Leventhal, concurring, slip opinon at 2).[10]

In *Childs*, the Court of Appeals affirmed, on constitutional grounds, the lower court decision requiring the

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[10] A copy of the as yet unreported decision in *Childs* v. *Board of Parole* is on file in the Clerk's office.

United States Board of Parole to give prisoners written reasons when denying them parole. By denying parole, the Board continues prisoners in their confinement and thus maintains their status quo, and is required by the Constitution and by the Rule of Administrative Law to provide prisoners with reasons for the continuation of their status. (The Board's own regulations require individual hearings prior to parole determination.) Yet petitioners argue that a transfer which produces a radical change in a prisoner's status quo by forcing him to endure more onerous and more restrictive conditions of confinement, need not be preceded by reasons, much less by a hearing. Such a position is not only paradoxical, it is contrary to the law. It is indicative of the need for a procedure which forces petitioners to "focus on the values served by its decision." *Greater Boston T.V. Corp.* v. *FCC, supra.* Also see, *Environmental Defense Fund* v. *Ruckleshaus,* 439 F.2d 584, 598 (D.C.Cir. 1971) and cases cited therein.

III. THE STATE OF NEW YORK CANNOT SHOW A SUFFICIENT INTEREST TO JUSTIFY TRANSFERRING PRISONERS ABSENT PRIOR, DUE PROCESS HEARINGS.

Until October 1974, the Federal Bureau of Prisons, like the Corrections Department of the State of New York, did not provide transfer hearings to its prisoners. However, the Bureau had been in the process of revising its disciplinary regulations to comply with the Court's decision in *Wolff* v. *McDonnell,* when two post-*Wolff* decisions were issued that concerned transfer. In *Clonce* v. *Richardson, supra,* and *Robbins* v. *Kleindienst, supra,* both courts decided that the Bureau of Prisons was responsible for providing notice and hearings comporting with the standards

enunciated in *Wolff*, to prisoners whose conditions of confinement would be substantially altered by a transfer.

As in Newkirk's case, all of the prisoners in *Robbins* were transferred from lesser to higher security prisons, some for disciplinary reasons, others for "adjustment" reasons, but all without benefit of any notice, much less an opportunity to respond. In *Clonce* v. *Richardson*, each of the federal prisoners was transferred to a behavior modification program in which the conditions of confinement were more restrictive than those of the segregation units from which the plaintiffs came. These prisioners, too, were denied any opportunity to challenge the reasons for which they were transferred. The Federal Bureau of Prisons has not appealed either decision[11] but, rather, has chosen to incorporate the *Wolff* standards into its operating procedures. Thus the federal Inmate Discipline regulation[12] specifically provides for equivalent notice and hearing procedures if the infraction under study might result in either segregation or transfer. In cases of emergencies, the regulation provides for hearings to be held soon after the transfer has been effectuated. One need not reach the merits of the Federal Bureau's transfer regulation to conclude that transfers do lend themselves to traditional due process procedures, that the need for summary disposition does not void the ability to provide due process, and that while transfers may be a "routine concomitant of prison life"[13]

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[11] The Department of Justice filed a notice of appeal in *Clonce* which it has withdrawn.

[12] Federal Bureau of Prisons Policy Statement, *Inmate Discipline*, No. 7400.5C (10/4/74).

[13] Brief for Petitioners, 16-17.

they can and must be accompanied by due process because of their inevitable effects upon the prisoner.[14]

Finally, petitioner argues that providing notice and hearing prior to transfers would endanger security, would be administratively unmanageable, and would not allow prison administrators sufficient flexibility in their exercise of authority. These are certainly factors which the Federal Bureau of Prisons considered prior to adopting the regulation referred to. Further, before the Bureau of Prisons issued its regulation, it followed its practice of providing the wardens of its prisons the opportunity to comment upon its rationale as well as its provisions.

Although the New York Corrections System is extensive, it is far exceeded in size and complexity by the federal prison system. Thus the persuasiveness of petitioner's arguments as to the administrative impossibilities posed by the introduction of due process into transfer decisions diminishes significantly in light of the Bureau's decision that transfers must be effectuated according to the mandates of *Wolff*.

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[14] In addition to the federal prison system, several state prison systems have adopted a notice and hearing procedure prior to transfer. See e.g. *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn. 1973). Also see National Advisory Commission on Criminal Justice and Goals: *Corrections* (1973), Standard 2.13, Procedures for Nondisciplinary Changes in Status, 54-55.

CONCLUSION

For the reasons stated above, *Amici* pray that the decision below be affirmed.

Respectfully submitted,

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